SIXTH DIVISION
MAY 13, 2011

No. 1-07-0057

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, vs. DARLING HAMILTON, Petitioner-Appellant.	Appeal from the Circuit Court of Cook County, Illinois No. 99 CR 22221 Honorable James Michael Obbish, Judge Presiding.

JUSTICE ROBERT E. GORDON delivered the judgment of the court.
PRESIDING JUSTICE GARCIA and JUSTICE LAMPKIN concurred in the judgment.

ORDER

Held: Where defendant failed to state a gist of a constitutional claim of ineffective assistance of counsel based on trial counsel's failure to pursue a fitness examination, dismissal of defendant's pro se post-conviction petition at the first stage was proper. In addition, a correction of the mittimus to reflect 343 days of pre-sentence custody credit is warranted.

Defendant Darling Hamilton was charged (1) with attempted first-degree murder (720 ILCS 5/8-4) (West 1998), (2) home invasion (720 ILCS 5/12-11) (West 1998), (3) residential burglary (720 ILCS 5/19-3) (West 1998), and (4) aggravated battery (720 ILCS 5/12-4) (West 1998). On August 21, 2000, defendant pleaded guilty to one count of attempt first-degree murder and the state *nol prossed* all the remaining charges.

Defendant was sentenced to 16 years in the Illinois Department of Corrections. Defendant did not appeal her conviction or sentence. On February 4, 2002, defendant filed a motion for modification of mittimus, pursuant to 735 ILCS 5/2-1801 (West 2004), which was dismissed as moot. On November 9, 2006, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (The Act) (725 ILCS 5/122-1) (West 2006), which was dismissed by the trial court at the first stage, as frivolous and patently without merit. Defendant now appeals the dismissal, claiming that: 1) she was denied effective assistance of trial counsel; and 2) the mittimus should be corrected to reflect 343 days of pre-sentence custody credit. For the reasons set forth below, we affirm the dismissal and order the mittimus to be corrected to reflect 343 days of pre-sentence custody credit.

BACKGROUND

According to the indictment, on July 16, 1999, at approximately 5:00 a.m., defendant forced her way into the victim's Chicago home and demanded money. The ninety-three-year-old victim refused and a struggle ensued. The two ladies fell to the floor in a nearby bathroom, where defendant then attempted to force and hold the victim's head, for a short period of time, under the water that was in the bathtub. The victim survived. Defendant then searched the victim's home looking for valuables to pilfer. Defendant could locate only some toiletries which she removed from the victim's home. Defendant was arrested on September 13, 1999 and charged with attempt first-degree murder, home invasion, residential burglary, and aggravated battery.

According to the record, defense counsel requested a pre-trial examination of defendant's fitness to stand trial. On November 16, 1999, the trial court ordered a

behavioral clinical examination (BCX). Six months later, on May 10, 2000, the examination had still not been completed, because the medical providers that had previously treated defendant had not produced defendant's medical records to the clinic performing the exam. By July 27, 2000, the clinic had still not completed the BCX, and defense counsel moved to withdraw his request for the examination. Defense counsel stated to the trial court: "I have had numerous discussions with Miss Hamilton via the phone and in person. There is absolutely no doubt about her ability, her fitness, and I wish to withdraw [the request for a BCX]." The trial court made no ruling on the withdrawal motion and proceeded with a Supreme Court Rule 402 pre-trial conference. (177 Ill.2d R. 402).

On August 21, 2000, the trial court was informed that defendant would plead guilty to attempt first-degree murder, and the State would *nol prosse* all remaining charges. The colloquy between the trial court and defendant is as follows:

> "THE COURT: [Darling Hamilton] [y]ou are charged with a class X felony. You can receive 6 to 30 years on attempted murder. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: There's a three-year mandatory supervised release period. Do you understand that as well?
>
> THE DEFENDANT: Okay. Could you say that again, sir?
>
> The COURT: It [is] a fancy word for parole.
>
> THE DEFENDANT: Okay.

THE COURT: It's a three-year supervised release period. Do you understand that?

THE DEFENDANT: Okay, yes.

THE COURT: Once you are released from the penitentiary, you will have three years of a supervised release period where you have to report to your parole officer. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: There [is] a possible 25 thousand dollar fine as well. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Is that the maximum sentence under the law, 6 to 30?

MS. WEHRLE: Yes, Judge.

THE COURT: Ma'am, do you understand the charge of attempt murder and the sentence, the possible sentence that I just told you about, yes or no?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that when you plead guilty, you are giving up your right to have the state prove you guilty beyond a reasonable doubt. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you also understand that when you plead guilty you are giving up your right to call your own witnesses and to question the state's witnesses?

THE DEFENDANT: Yes, sir.

THE COURT: Are you giving up your right to a jury trial of 12 people who will determine if you are guilty or not?

THE DEFENDANT: Yes, sir.

THE COURT: Are you giving up your right to a bench trial where I as judge will sit and listen to the evidence and determine whether you are guilty or not guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Are you giving up your right to remain silent by telling me what your plea is?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone forced you to plead guilty to the charge of attempt murder?

THE DEFENDANT: No, sir.

THE COURT: [Did] [a]nybody make any promises to you other than my promise to you that you would plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anyone made any threats to you in

order to get you to plead guilty?

THE DEFENDANT: No, sir."

The trial court then accepted defendant's guilty plea.

The sentence range for attempt murder is 6 to 30 years. (720 ILCS 8-4(a)(1)) (West 1998). The trial court stated that "based upon the facts present in the case, defendant's remorse and accepting responsibility for her actions, aggravation, mitigation, all of the matters in the pre-sentence investigation, including rehabilitation potential, I will sentence you on the attempt murder charge to sixteen years [in the] Illinois Department of Corrections." The trial court then advised defendant that she had a right to withdraw her guilty plea within 30 days; defendant responded that she understood but did not want to withdraw her guilty plea. The trial court finally asked if the defendant had anything further to add. Defendant responded by requesting that she be immediately transported to the Illinois Department of Corrections.

As noted, defendant never appealed her conviction, but on February 4, 2002, she filed a motion for modification of mittimus claiming her sentence should be 6 years, as opposed to 16 years, which was dismissed by the trial court as moot. On November 9, 2006, defendant filed a *pro se* petition for post-conviction relief, in which she claimed that her mental status at the time of her conviction made her unfit to stand trial, and as a result, she was unable to understand the consequences of her plea agreement and guilty plea. Defendant also claimed that she was denied effective assistance of counsel because trial counsel "did not insist that the court provide a fitness hearing." In support of her claim, defendant provided medical records from numerous medical facilities and

hospitals that indicated that she had suffered from schizophrenia, substance abuse, antisocial personality disorder, drug induced hallucinations and borderline intellectual function, for most of her life. In addition, the medical records indicated that, in 1994, defendant was found unfit to stand trial. However, she was re-evaluated the following year and then found fit for trial. Defendant's medical records also indicated that she had attempted suicide on several occasions. Defendant did not present any expert reports or testimony that she was unfit to stand trial on the day she pleaded guilty to the attempt first degree murder charge. On December 7, 2006, the trial court summarily dismissed defendant's post-conviction petition finding defendant's claims were without merit and frivolous, and defendant now appeals.

ANALYSIS

On appeal, defendant claims that her *pro se* post-conviction petition for relief should not have been dismissed by the trial court because the petition stated the gist of a constitutional claim of ineffective assistance of counsel. Defendant specifically alleges that her trial counsel was ineffective (1) because he withdrew an earlier request for a fitness examination and allowed defendant to plead guilty, and (2) because he knew or should have known that defendant was unfit to stand trial. Defendant claims that she could not have raised these issues on direct appeal that show her mental state, because her medical records, were outside the trial record. People v. Wright, 329 Ill. App. 3d 462, 467 (2002), citing People v. Enis, 194 Ill.2d 361, 375-76 (2000), citing People v. Holman, 164 Ill.2d 356, 362, 376 (1995).

A post-conviction petition is a collateral attack on a prior conviction and/or

sentence and therefore is limited to constitutional matters that either were not or could not have been previously adjudicated; it is not a substitute for a direct appeal. People v. Rissley, 206 Ill.2d 403, 411-412 (2003). Generally, "issues that were raised on direct appeal from [the] underlying judgment of conviction, or that could have been raised but were not, ordinarily will not be considered in post-conviction proceeding." People v. Wright, 329 Ill. App. 3d 462, 467, citing People v. West, 187 Ill.2d 418, 425. The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.*) (West 2006) provides a means by which a defendant may challenge a conviction or sentence for violations of . . . constitutional rights. People v. Pendleton, 223 Ill.2d 458, 471 (2006), citing People v. Whitfield, 217 Ill.2d 177, 183 (2005). To be entitled to post-conviction relief, a defendant must show that he or she has suffered a substantial deprivation of constitutional rights in the proceedings that produced the conviction or sentence being challenged. 725 ILCS 5/122-1(a)(1) (West 2006); Pendleton, 223 Ill.2d at 471, citing Whitfield, 217 Ill.2d at 183.

The Act provides for three stages, in non-capital cases. Pendleton, 223 Ill.2d at 471-72. At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it, if the trial court finds that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2006); Pendleton, 223 Ill.2d at 472. If the trial court does not dismiss the petition within that 90-day period, the trial court must docket it for further consideration. 725 ILCS 5/122-2.1(b) (West 2006); Pendleton, 223 Ill.2d at 472.

The Illinois Supreme Court has held that, at this first stage, the trial court

evaluates only the merits of the petition's substantive claim, by determining whether the allegations in the petition, liberally construed, set forth the gist of a constitutional claim that would provide relief under the Act, People v. Edwards, 197 Ill. 2d 239, 244 (2007), and not its compliance with procedural rules. People v. Perkins, 229 Ill.2d 34, 42 (2007). The issue at this first stage is whether the petition presents the gist of a constitutional claim. Perkins, 229 Ill.2d at 42, quoting People v. Boclair, 202 Ill.2d 89, 99-100 (2002), quoting People v. Gaultney, 174 Ill.2d 410, 418 (1996). The trial court will decide whether the petition states "the gist of a constitutional claim." If the trial court does not dismiss the petition, it will proceed to the second stage.

The Act provides that, at the second stage, counsel may be appointed for defendant, if defendant is indigent. 725 ILCS 5/122-4 (West 2006); Pendleton, 223 Ill.2d at 472. After defense counsel has made any necessary amendments to the petition, the State will usually move to dismiss it. Pendleton, 223 Ill.2d at 472 (discussing 725 ILCS 5/122-5 (West 2006)). See also Perkins, 229 Ill.2d at 43. If the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage. People v. Coleman, 183 Ill.2d 366, 380-81 (1998). Again, a trial court is foreclosed "from engaging in any fact finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceeding." Coleman, 183 Ill.2d at 380-81. However, the trial court reviews the record as a whole. People v. Brown, 236 Ill. 2d 184-85 (2010).

If the State chooses not to file a dismissal motion, then the State "shall" answer the petition. 725 ILCS 5/122-5 (West 2006); Pendleton, 223 Ill.2d at 472. If the trial

court denies the State's motion to dismiss and/or find that the defendant has presented the "gist of a constitutional claim" (725 ILCS 5/122-5 (West 2006)), the proceeding then advances to the third stage, which provides an evidentiary hearing. 725 ILCS 5/122-6 (West 2006); Pendleton, 223 Ill.2d at 472-73. At the hearing, the trial court "may receive proof by affidavits, depositions, oral testimony, or other evidence," and "may order the petitioner brought before the court." 725 ILCS 5/122-6 (West 2006).

In the case at bar, the trial court summarily dismissed defendant's post-conviction petition at the first stage, finding defendant's claims were without merit and frivolous.

A pro se post-conviction petition is frivolous or patently without merit only if it "has no arguable basis either in law or in fact." People v. Hodges, 234 Ill. 2d 1, 16 (2009); Brown, 236 Ill. 2d at 184-85. A petition lacking an arguable basis in law or fact is one "based on an indisputably meritless legal theory or a fanciful factual allegation." Brown, 236 Ill. 2d at 185. A claim completely contradicted by the record is an example of an indisputably meritless legal theory. Brown, 236 Ill. 2d at 185. Fanciful factual allegations are those that are fantastic or delusional. Brown, 236 Ill. 2d at 185.

A. Post-Conviction Petition for Relief

When appealing a first-stage dismissal order of a post-conviction petition for relief the question is "whether the allegations in the petition, liberally construed and taken as true, are sufficient to invoke relief[.]" Coleman, 183 Ill.2d at 388. "Due to the elimination of all factual issues at the dismissal stage of a post-conviction proceeding, the question is, essentially, a legal one, which requires the reviewing court to make its own independent assessment of the allegations." Coleman, 183 Ill.2d at 388. Accordingly,

our standard of review is *de novo*. Coleman, 183 Ill.2d at 388.

To prevail at the first stage of a petition for post-conviction relief, an imprisoned defendant must allege that in the proceeding, which resulted in conviction, there was a substantial denial of defendant's constitutional rights. 725 ILCS 5/122-1 (West 2006). In order for a *pro se* petition for post-conviction relief to survive dismissal by the trial court at the first stage, the defendant must demonstrate the gist of a claim of constitutional deprivation. People v Coleman, 183 Ill.2d 366, 381(1998), quoting People v. Porter, 122 Ill.2d 64, 84 (1988).

In the case at bar, in defendant's *pro se* petition for post-conviction relief, she claimed that her counsel was ineffective when he withdrew a request for a fitness examination and allowed defendant to plead guilty. Defendant further claims that she was unfit to stand trial, a fact which defendant's trial counsel knew or should have known. A successful claim of ineffective assistance of counsel requires a two-pronged showing of both deficient representation and prejudice. Strickland v. Washington, 466 U.S. 668, 690, 80 L. Ed. 2d 674, 698, 104 S. Ct. 2052, 2066 (1984), People v. Albanese, 104 Ill.2d 504, 525 (1984). If we can dismiss on the second prong for failure to show prejudice, we need not discuss the first prong. Albanese, 104 Ill.2d at 527. For the first prong, to show deficient representation, defendant must show that "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688, 80 L. Ed. 2d at 692, 104 S. Ct. at 2064, Albanese, 104 Ill.2d at 525.

For the second prong, the Illinois Supreme Court in Mitchell ruled that when failure to secure a fitness hearing of the defendant is the basis for an ineffective

assistance of counsel claim, the test for determining prejudice is whether there exists a reasonable probability that defendant would have been found unfit, had she received the fitness hearing. People v. Mitchell, 189 Ill.2d 312, 334 (2000). The Mitchell court explicitly overruled Brandon, which had held that all defendant had to show was that the facts at trial would have raised enough doubt for the court to require a fitness hearing. Mitchell, 189 at 332, citing People v. Brandon, 162 Ill.2d 450, 458 (1994).

However, four months later, the Illinois Supreme Court decided the Easley case, did not cite Mitchell, but fine tuned what they said in Mitchell. The supreme court explained that

> "to establish that his trial counsel's alleged incompetency prejudiced him within the meaning of Strickland, defendant must show that facts existed at the time of his trial that would have raised a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings and to assist in his defense. Defendant is entitled to relief on this post-conviction claim only if he shows that the trial court would have found a *bona fide* doubt of his fitness and ordered a fitness hearing if it had been apprised of the evidence now offered." People v. Easley, 192 Ill.2d 307, 319 (2000).

Subsequent to the decisions in Mitchell and Easley, the Illinois Appellate Court, and the Illinois Supreme Court, has relied on both the ruling in Easley and the ruling in Mitchell.

People v. Pitsonbarger, 205 Ill.2d 444, 470,(2002), People v. Barrow, 195 Ill.2d 506, 538 (2001), People v. Jones, 191 Ill.2d 194, 199 (2000), People v. Moore, 189 Ill.2d 521, 533 (2000), People v. Hayden, 338 Ill. App. 3d 298, 313 (2003), People v. Alberts, 383 Ill. App. 3d 374, 374 (2008), People v. Gilbert, 379 Ill. App. 3d 106, 115 (2008), People v. Dominguez, 331 Ill. App. 3d 1006, 1017 (2002), all cite Mitchell, whereas, People v. Johnson, 209 Ill.2d 227, 246 (2002), People v. Shum, 207 Ill.2d 47, 57 (2003), People v. Harris, 206 Ill.2d 29,3, 304 (2002), People v. Logan, 352 Ill. App. 3d 73, 82 (2004), People v. Tursios, 349 Ill. App. 3d 126, 130 (2004), People v. Hill, 345 Ill. App. 3d 620, 627 (2003), People v. Burt, 205 Ill.2d 28, 39 (2001), People v. Chamberlain, 354 Ill. App. 3d 1070, 1073 (2005), People v. Vernon, 346 Ill. App. 3d 775, 779 (2004), People v. Henney, 334 Ill. App. 3d 175, 192 (2002), cite Easley.) However, even under the "*bona fide* doubt as to fitness" standard set forth in Easley, defendant's ineffective assistance of counsel claim fails on the prejudice prong. Easley, 192 Ill.2d at 319.

When determining fitness, "the issue is not mental illness, but whether defendant could understand the proceedings against him [or her] and cooperate with counsel in his [or her] defense. If so, then, regardless of mental illness, defendant will be found fit to stand trial." Easley, 192 Ill.2d at 323. "Relevant factors that a trial court may consider in assessing whether a *bona fide* doubt of fitness exists include a defendant's 'irrational behavior, his [or her] demeanor at trial, and any prior medical opinion on competence to stand trial.' " People v. Stephan, 322 Ill. App. 3d 620, 628 (2001), quoting People v. Damico, 309 Ill. App. 3d 203, 209 (1999). For a doubt as to the fitness of a defendant to be *bone fide,* it must be a "real, substantial and legitimate doubt" assessed against an

objective standard. People v. Eddmonds, 143 Ill.2d 501, 518 (1991). Furthermore, "[f]itness speaks only to a person's ability to function within the context of trial. It does not refer to sanity or competence in other areas. A defendant can be fit for trial although his mind may be otherwise unsound." People v. Murphy, 72 Ill.2d 421, 432. (1978).

In the instant case, in order for defendant to prevail at the first stage, the record must show a "gist" of a claim that there was a *bona fide* doubt of defendant's ability to understand the nature and purpose of the proceedings and to assist in her defense. Coleman, 183 Ill.2d at 381 ("only the 'gist' of a constitutional claim need be asserted in order to survive dismissal."), Easley, 192 Ill.2d at 319. In reviewing the case at bar, this court will consider the relevant factors we noted that were listed in Stephan, 322 Ill. App. 3d at 628. In addition, "all well-pleaded facts in the petition and in any accompanying affidavits, in light of the original trial record, are to be taken as true." Easley, 192 Ill.2d at 307.

Here, there is nothing in the record that suggests that, at the time of defendant's guilty plea that a *bona fide* doubt existed regarding her fitness. Although defense counsel initially requested a BCX examination for fitness on November 11, 1999, defense counsel had many opportunities to converse with defendant and observe her behavior during the following eight months. After having "numerous discussions with [defendant] via the phone and in person," defense counsel advised the trial court that there was "absolutely no doubt" about defendant's fitness. The trial court had an opportunity to observe the defendant and the transcript of the guilty plea proceedings does not indicate any instance where defendant exhibited an inability to understand the nature and purpose

of the proceedings against her, or to assist in her defense. Defendant did not display any confusion or difficulty in responding to the trial court's questioning. In fact, all of defendant's responses were made in a rational, coherent and respectful manner, which demonstrates that she understood what was happening, and was well able to assist with her defense. See People v. Harris, 206 Ill. 2d 293, 305 (2002) (noting that defendant's responses to the court demonstrated an understanding of the nature and purpose of the proceedings).

Defendant attaches her medical records which reveal a long history of schizophrenia, drug addiction, and drug-induced hallucinations. However, there is no indication that defendant was on any drugs at the time of her guilty plea because she was incarcerated and would have been in no position to obtain them. There was no showing that defendant's diagnosis of schizophrenia would in any event effect her fitness to stand trial or that she could not understand the consequences of her guilty plea.

The Easley case is instructive to our analysis, even though it is a capital case subject to the pleading standard applicable to a second stage proceeding. We cite Easley not for the purpose of determining the applicable pleading standard, but for analyzing the test for determining prejudice when a defendant claims the failure to secure a fitness hearing as the basis for an ineffective assistance of counsel claim under Strickland v. Washington, 466 U.S. 668 (1984). At issue in the Easley case was trial counsel's failure to seek a fitness hearing, whereas in the case at bar, trial counsel moved to withdraw a previously granted request for a fitness exam and allowed defendant to plead guilty. However, there are enough factual similarities between the two cases to make Easley

applicable. Both Easley and the case at bar concern defendant's fitness to stand trial, a claim of ineffective assistance of counsel and the dismissal of a post-conviction petition, without an evidentiary hearing.

In Easley, the Illinois Supreme Court found that Easley suffered from "mental impairments" yet still upheld the trial court's dismissal of defendant's post-conviction petition. Easley, 192 Ill.2d at 322-23. The supreme court explained that a colloquy between the Easley defendant and the trial court, at a pretrial hearing, showed that he "understood the nature of the proceeding." Easley, 192 Ill.2d at 321. The Illinois Supreme Court found that the colloquy between the Easley defendant and the trial court was not a misunderstanding of the proceeding; rather, defendant was expressing dissatisfaction with the court's procedure of searching him before entering the courtroom, which defendant found demeaning. Easley, 192 Ill.2d at 322. The Illinois Supreme Court concluded that "defendant's post-conviction petition does not raise a *bona fide* doubt of his fitness to stand trial." Easley, 192 Ill.2d at 323.

Similarly, in the case at bar, the colloquy between defendant and the trial court indicated that she understood the proceedings, thus confirming her counsel's representation, based on his numerous discussions with his client, that she was fit. The record indicated no instances of irrational behavior or lack of understanding by the defendant. Unlike the Easley defendant, who expressed his dissatisfaction in open court, (Easley, 192 Ill.2d at 321), the defendant in the case at bar was quite respectful. At no time did defendant's demeanor indicate any reason for the trial court to question her fitness to plead guilty. In fact, the record demonstrates just the opposite.

While defendant, in the case at bar, was being admonished by the trial court regarding her guilty plea, she indicated that she understood the consequences of pleading guilty. Similarly, the Easley defendant expressed to the trial court that he understood the jury selection process and that he understood his life was on the line in the proceedings. Easley, 192 Ill.2d at 321. When defendant, in the case at bar, did not understand something, she asked the trial court for clarification, which the court provided. In addition, defendant had the wherewithal to request the trial court to send her to the Illinois Department of Corrections immediately, so she could begin serving her sentence. Defendant had ample opportunity to withdraw her guilty plea before and after sentencing. However, defendant declared, in open court, that she did not wish to withdraw her plea.

While the defendant claims in her petition that she suffered from mental illness, this would not automatically make her unfit for trial. A person can be fit for trial, if their mind is otherwise unsound. Murphy, 72 Ill.2d at 432. In affirming the conviction for taking indecent liberties with a six-year old girl, the Illinois Supreme Court in Murphy found that "the determination of whether there is a bona fide doubt of fitness for trial depends on the facts of each case." Murphy, 72 Ill.2d at 435. In the case at bar, the record shows that defendant was once found unfit for trial in 1994, however, she was re-evaluated and later found fit to stand trial the following year. Neither the petition nor the record support defendant's claim that she was unfit on the day she plead guilty.

In Easley, the Illinois Supreme Court held that "psychological examinations that post-conviction counsel procured six years subsequent to defendant trial" did not amount to a *bona fide* doubt of defendant's fitness at the time of trial. Easley, 192 Ill.2d at 322.

Similarly, in the case at bar, it has been six years between defendant's guilty plea and defendant's post-conviction petition. Thus, even if defendant had procured an evaluation from a medical provider stating that she was currently unfit, it would not amount to a *bona fide* doubt of defendant's fitness at the time she pleaded guilty, unless that medical provider opined that she was unfit at that time. People v. Bennett, 159 Ill. App. 3d 172, 184 (1987).

After considering all the relevant factors in Stephan, there is nothing in the petition or defendant's medical records provided to support a gist of a claim of ineffective assistance of counsel. There is no showing that defendant's counsel deviated from an objective standard that constituted deficient representation or that defendant was prejudice. Accordingly, we affirm the first-stage dismissal of defendant's *pro se* petition for post conviction relief.

B. Correct Mittimus

Finally, defendant claims that the mittimus should be corrected to reflect 343 days of pre-sentence custody credit, and the state agrees. Therefore, we order the mittimus corrected to reflect 343 days of pre-sentence custody credit. People v. Harper, 387 Ill. App. 3d 240, 244 (2008); 134 Ill.2d R. 615. In Harper, this court held that "we have the authority to correct the mittimus at any time without remanding the matter to the trial court." Harper, 387 Ill. App. 3d at 244 (ordering the mittimus corrected to reflect additional days of pre-sentence custody credit), citing People v. Pryor, 372 Ill. App. 3d 422, 438.

CONCLUSION

In sum, we cannot find that the defendant stated a gist of a constitutional claim of ineffective assistance of counsel, based on counsel's failure to pursue a fitness examination. Therefore, we affirm the first-stage dismissal of defendant's *pro se* petition for post-conviction relief. In addition, we order the mittimus corrected to reflect 343 days of pre-sentence custody credit.

Affirmed.